Filed 10/21/16 Belser v. City of Inglewood CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| LILAH BELSER, a Minor, etc., et al.,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>CITY OF INGLEWOOD,<br><br>Defendant and Respondent. | B270175<br><br>(Los Angeles County Super. Ct. No. BC538285) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Howard L. Halm, Judge. Affirmed.

Law Offices of Drociak & Yeager and Kenneth C. Yeager for Plaintiff and Appellant.

Olivarez Madruga, Thomas M. Madruga and Deborah Lee-Germain for Defendant and Respondent.

Appellant Lilah Belser, a minor represented in this proceeding by a guardian ad litem, lost part of her little

finger while playing in a park owned by respondent City of Inglewood (the City). She appeals the trial court's order granting summary judgment in favor of the City on her claim for dangerous condition of public property. Finding that appellant failed to raise a triable issue of material fact in opposing the motion for summary judgment, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

The essential background facts are not in dispute. On August 9, 2013, appellant, then 12, was playing on the swing set at Edward Vincent Jr. Park in Inglewood. She decided to dismount the swing while it was in motion. In preparation for doing so, she crossed her left hand over her right to grab the right hand chain, inadvertently inserting her left pinky finger into one of the links. When she jumped from the swing, her little finger was caught inside the link and partially amputated.

In December 2013, appellant filed a claim for damages against the City, alleging "the chain link openings on the swing set snagged her . . . finger[,]" and "were too large for use by minor children." In March 2014, she brought suit against the City for premises liability through guardian ad litem Lila Cherry. Her complaint alleged that "[t]he wide opening on the swing set [chain] links created a dangerous condition in violation of Government Code Section 835," that the City had constructive notice of the existence of the

dangerous condition, and that the condition was created by employees of the City.[1]

The City moved for summary judgment. Its moving papers established that it had installed new playground equipment at all its parks in October 2012. Shortly after the equipment was installed, a certified playground safety inspector, Terrie S. Norris, inspected the new equipment and determined it was in compliance with the standards of the American Society for Testing & Materials (ASTM), as required under section 115725 of the Health and Safety Code.[2]

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[1] Government Code section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." (Undesignated statutory references are to the Government Code.)

[2] Section 115725 of the Health and Safety Code provides: "(a) All new playgrounds open to the public built by a public agency or any other entity shall conform to the playground-related standards set forth by the American Society for Testing and Materials and the playground-related guidelines set forth by the United States Consumer

*(Fn. continued on next page.)*

The chains used for the swing sets were "5/0 'long link' chain[s]" which, according to the City's expert Scott Burton, was the "standard size used by most distributors" and the "uniform size and type of most swing sets around the country."[3] He based this on his examination of "approximately 2852 playgrounds," his inspection of "approximately 1.2 million chain links on swing chains," and his consultation with numerous swing chain distributors. Burton confirmed that "[t]he subject swing set met all applicable ASTM standards and regulations," and explained that "there is an exemption for the chain and consequently, the size of the opening for the chain link, as the ASTM committee does not consider chain and its method of attachment to be a dangerous condition." Burton said that in the 34 years he had been involved in the playground industry, he had never observed or heard of the occurrence of a finger injury of the type suffered by appellant. In Burton's opinion, "the links on the subject swing did not present any

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Product Safety Commission. [¶] (b) Replacement of equipment or modification of components inside existing playgrounds shall conform to the playground-related standards set forth by the American Society for Testing and Materials and the playground-related guidelines set forth by the United States Consumer Product Safety Commission."

[3] Burton is a "Certified Playground Safety Inspector," a "voting member of the [ASTM]," and a former "advisor to the [Consumer Product Safety Commission (CPSC)] for the revisions to the Public Playground Safety Guidelines."

risk of injury to [appellant] or any other users," "[t]here [was] nothing overtly or inherently dangerous about the subject chain link," and "the chain [did] not pose a crush or shear hazard since there [was] no closing force to create a guillotine [e]ffect." According to Burton, appellant's injury was "an unfortunate accident, caused by the awkward nature of [her] crossing her left hand to her right side and trying to dismount the swing while still in motion."

The City also established that prior to receiving appellant's claim, it had not received "any requests for repair, complaints, notification of injuries or government claims regarding the swing set." In addition, "[t]he subject chain [was] still in use," and "no one ha[d] been injured on the swing since [appellant's] injury." Thus, it had "no information, knowledge or reason to believe the new swing set presented any danger to [appellant] or any users of the equipment." The City argued that the chain used on the swing set did not constitute a "dangerous condition" as it complied with ASTM regulations and was approved by a Certified Playground Safety Inspector as mandated by Health and Safety Code section 115725. It further contended "the unorthodox manner in which [appellant] jumped off the swing created the substantial risk of injury and not the swing itself," that the absence of similar incidents established that any alleged risk opposed by the chain link was insignificant, and that "holding the City liable under the . . . conditions [that prevailed] would amount to strict liability."

To support a showing that the swing's chain links constituted a dangerous condition on public property presenting a substantial risk of injury, appellant presented the expert declaration of Jay William Preston.[4] Preston stated he had examined the links and found them to have openings that varied from .40 inches to .47 inches. He described the openings as "nearly twice as large as accepted standards" because the size of the cylinder "generally used in assessing finger penetration safety hazards" was ".25 (1/4) inch or .375 (3/8) inch." He said the openings were "so wide that many adults' pinky fingers [would be] able to penetrate," and that when he "first saw the . . . links," he "immediately opined" they were "too big . . . to be safe for children[] who would use the swings." Without identifying any particular provision of the ASTM standards, he stated that ASTM "Rules and Guidelines" "would deem the suspension chain links on [the City's] swings in Edward Vincent, Jr. Park an entrapment hazard." He expressed the opinion that the chains constituted a "dangerous condition" which could have been rectified by using "smaller suspension

[4] Preston was a registered professional safety engineer, certified by the Board of Certified Safety Professionals of the Americas, and a chartered member of the Institution of Occupational Safety and Health, who had experience providing safety engineering assistance and accident investigation and reconstruction. The court found him qualified to provide an opinion regarding whether the Swing's chain constituted a dangerous condition.

links, which [would be] entrapment free" or "by encasing the suspension links in a plastic tube covering" for less than $25.

Appellant argued that Preston's declaration established that "the [subject] chain links [were] nearly twice the size of the typical diameter of suspension chain links, and [were] excessive and outside the generally accepted maximum for children swing sets[,] creat[ing] an entrapment hazard" and that the openings were "obviously too big." She also contended that the City could have prevented the injury by installing the plastic coverings discussed in Preston's declaration.

The trial court granted the motion for summary judgment. Relying on the evidence presented by the City that the swing set was installed in October 2012 and that a certified playground safety inspector had examined the equipment and concluded it met all applicable ASTM standards, the court found the City had carried its initial burden of showing that the swing set did not constitute a dangerous condition. It next considered whether Preston's declaration created a triable issue of material fact, particularly his conclusions that the "generally accepted maximum opening" was .25 inches or that ASTM rules and guidelines "would deem" the chain an entrapment hazard. The court concluded Preston's declaration fell short because he failed "to provide any facts, guidelines, or standards to support his contention that the industry standard is to allow chain link openings of no more than .25 inches for swing sets," failed to explain "why the ASTM Rules and Guidelines

would deem the Swing's chain an entrapment hazard," and failed to specify "which particular ASTM rule or rules require chain openings to be smaller than .40 or .47 inches." The court further found that appellant had established neither that any city employee was responsible for creating the condition at issue, nor that the City had actual or constructive notice that the swing set was in a dangerous condition, as there had been no other complaints regarding it. Judgment was entered in favor of the City. This appeal followed.

## DISCUSSION

A. *Standard of Review for Summary Judgment*

"A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law." (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) "Where the defendant is the moving party, it must show that a cause of action has no merit by putting forth evidence that either one or more elements of the cause of action . . . cannot be established or that a complete defense exists thereto. [Citations.] If the defendant meets this burden, the burden shifts to the plaintiff to establish that a triable issue of material fact exists. [Citations.]" (*County of San Diego v. Superior Court* (2015) 242 Cal.App.4th 460, 467.)

On appeal, we review the grant of summary judgment de novo. (*Miller v. Department of Corrections*, *supra*, 36

Cal.4th at p. 460.) "We apply the same three-step analysis required of the trial court. ""First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond . . . . [¶] Secondly, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in movant's favor. . . . [¶] When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable, material factual issue.'" [Citations.]' [Citation.]" (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503.) We liberally construe the evidence introduced by the party opposing summary judgment, resolving doubts concerning the evidence in favor of that party. (*Miller v. Department of Corrections*, *supra*, 36 Cal.4th at p. 460.)

B. *Existence of a Dangerous Condition and Actual or Constructive Notice*

"A public entity is not liable for an injury arising out of the alleged act or omission of the entity except as provided by statute." (*Brenner v. City of El Cahon* (2003) 113 Cal.App.4th 434, 438 (*Brenner*).) Section 835 is the "statutory basis for a claim imposing liability on a public entity based on the condition of public property." (*Brenner, supra,* 113 Cal.App.4th at p. 438.) To establish a cause of

action against a public entity under section 835, a plaintiff must plead and prove: "(1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injury; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it." (*Brenner*, *supra,* at p. 439; accord, *Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1455 ["[A] public entity is liable for injury proximately caused by the dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventative measures."]; *County of San Diego v. Superior Court*, *supra*, 242 Cal.App.4th at p. 467 [plaintiff is required to establish that condition creates substantial risk of harm when used with due care by the public generally].)

"Dangerous condition" is defined by section 830.2, which provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff,

determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used." A public entity has actual notice of a dangerous condition if it had "actual knowledge of the existence of the condition and knew or should have known of its dangerous character." (§ 835.2, subd. (a).) A public entity has constructive notice of a dangerous condition "only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." (§ 835.2, subd. (b).)

The intent of the governing statutes "'is to impose liability only when there is a substantial danger which is not apparent to those using the [public entity's] property in a reasonably foreseeable manner with due care. [Citations.]'" (*Biscotti v. Yuba City Unified School Dist*. (2007) 158 Cal.App.4th 554, 558, quoting *Fredette v. City of Long Beach*

(1986) 187 Cal.App.3d 122, 131, italics omitted.)[5] Although generally "it is a factual question whether a given set of facts and circumstances creates a dangerous condition, the issue may be resolved as a question of law if reasonable minds can come to but one conclusion." (*Brenner*, *supra*, 113 Cal.App.4th at p. 440; accord, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1133.) The rule permitting a court to determine that the danger from the identified condition was minor or not substantial "provides a check valve for the elimination from the court system of unwarranted litigation which attempts to impose upon a property owner what amounts to absolute liability for injury to persons who come upon the property." (*Ursino v. Big Boy Restaurants* (1987) 192 Cal.App.3d 394, 399; see *Sambrano v. City of San Diego*, *supra*, 94 Cal.App.4th at p. 240 ["[P]ublic entities are not insurers against injuries arising from minor or trivial defects"]; *Rodriguez v. City of Los Angeles* (1959) 171

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[5] The statutory definition of dangerous condition, requiring that the condition pose a substantial risk of injury when the property is used with due care in a manner in which it is reasonably foreseeable that it would be used, "'takes into consideration the lower standard of care which is expected of children.'" (*Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 239), quoting *Mathews v. City of Cerritos* (1992) 2 Cal.App.4th 1380, 1385.)

Cal.App.2d 761, 771 ["A [government entity] is not liable for a trivial defective condition that could not reasonably be anticipated to result in accidents. [Citation.] Whether a defective condition was trivial will be determined by a reviewing court irrespective of the finding of the trier of fact. [Citation.]"].)

Although not always dispositive, evidence that a property owner complied with applicable statutes, regulations, or other established standards or guidelines may be accepted by the court as sufficient to establish as a matter of law the absence of a hazardous condition "where the evidence shows no unusual circumstances." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1087; see *Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 31 [property owner's compliance with law or safety regulations "'relevant to show due care"']; *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 115 [compliance with applicable statutes and regulations is "'a "factor to be considered . . . in determining the reasonableness of the conduct in question"'"].) Similarly, "the absence of other similar accidents is 'relevant to the determination of whether a

condition is dangerous.'" (*Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337, 1346.)

Here, the City presented evidence that it complied with applicable guidelines and standards pertinent to playground equipment. It also presented evidence that no similar accident had occurred either in its parks or in any other playground of which its qualified expert was aware from the thousands of playgrounds and play structures he had inspected and his decades of experience in the industry. This was sufficient to establish that no dangerous condition existed and that the City lacked actual or constructive notice that the size of the chain links posed a substantial danger, negating both the dangerous condition and notice elements of appellant's claim. This met the City's initial burden as moving party to justify entry of judgment in its favor, shifting the burden to appellant.

Appellant sought to raise the existence of a material triable issue of fact through the declaration of its expert. Preston asserted conclusions and ultimate opinions without explanation, basis or support. Burton had stated that the 5/0 link size in the subject chain was the standard nationwide, which he explained was based on his examination of thousands of playgrounds and play

structures and consultation with equipment distributors. Preston stated that he relied on "accepted standards" to establish that the opening in the links was excessive. However, he did not identify the standards to which he was referring or establish that any such standards applied to playground equipment or swing chains or required chain links to be a specific size. Burton and the City's safety inspector stated that all ASTM standards for playground equipment had been met. Preston opined that ASTM "Rules and Guidelines" "would deem the suspension chain links . . . an entrapment hazard," but did not identify any such standard.

A party "cannot manufacture a triable issue of fact through use of an expert opinion with self-serving conclusions devoid of any basis, explanation, or reasoning." (*Nardizzi v. Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 Cal.App.4th 1409, 1415.) "'The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations.] Where an expert bases his conclusions upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his

conclusion has no evidentiary value.'" (*Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563, quoting *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) "[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510.) In view of the lack of explanation of the conclusions and opinions in Preston's declaration, the trial court did not err in disregarding his conclusory statements that some unknown standard had been violated by installing the chains at issue.[6]

Preston otherwise relied on the fact that the links were large enough to be penetrated by an adult pinky finger to support his contention that they represented a dangerous condition. He stated that when he first saw the links he "immediately opined that the openings were too big . . . to be safe for children." Appellant contends that no more specific opinion is required to establish that wide openings in the suspension chain links create a dangerous condition. We disagree. "[A] claim alleging a dangerous condition may not

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[6] *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, on which appellant relies, does not assist her, as it did no more than apply the principles we have articulated to the facts of the medical malpractice case before it.

rely on generalized allegations [citation] but must specify in what manner the condition constituted a dangerous condition. [Citation.]" (*Brenner*, *supra*, 113 Cal.App.4th at pp. 439-440.) "It is not proper to reason backwards to say that since [the plaintiff] was seriously injured, there was a substantial risk of such injury attributable to the condition of public property." (*Sambrano*, *supra*, 94 Cal.App.4th at p. 241.) Here, appellant was injured when she executed an unusual maneuver and inadvertently inserted the finger of her left hand into one of the links of the swing's right chain before jumping off. Burton stated the size used by the City was the size used in most of the 2,852 playgrounds he had examined, and that he had heard of no similar injuries in his 34 years in the industry. The large openings could well be the reason no similar accidents have occurred before or since, as they make it more likely that a child's small fingers would slip in and out without injury. In the absence of a reasoned contrary opinion from a playground safety expert, the trial court had no basis to disregard the opinion of the City's qualified expert and safety inspector that the swing equipment was safe. We find no basis to reverse the grant of summary judgment.

## DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.